

# EXHIBIT 175

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CITIZENS FOR CONSUME, et al . CIVIL ACTION NO. 01-12257-PBS  
Plaintiffs .  
. .  
v. . BOSTON, MASSACHUSETTS  
. MAY 16, 2007  
ABBOTT LABORATORIES, et al .  
Defendants .  
. . . . .

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE MARIANNE B. BOWLER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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P R O C E E D I N G S

2 (Court called into session)

3 THE CLERK: The Honorable Marianne B. Bowler  
4 presiding. Today is May 16<sup>th</sup>, 2007 in the case of Citizens for  
5 Consume, et al v. Abbott Laboratories, et al, Civil Action No.  
6 01-12257 will now be heard.

7 Would counsel please identify themselves for the  
8 record.

9 MS. BROOKER: Rene Brooker on behalf of the United  
10 States.

11 MR. BREEN: Jim Breen on behalf of Ven-A-Care of the  
12 Florida Keyes, the relator.

13 MR. DRAYCOTT: Justin Draycott on behalf of the  
14 United States.

15 MR. DALEY: Good afternoon, Your Honor, Jim Daly on  
16 behalf of Abbott Laboratories.

17 MR. WINCHESTER: And Jason Winchester, also for  
18 Abbott. Your Honor, I filed an appearance, I believe  
19 yesterday, and also a motion for admission pro hac vice. I've  
20 not appeared--

21 THE COURT: I think I allowed it this morning.

22 MR. WINCHESTER: --before the Court before.

23 THE COURT: 8:00.

24 MR. WINCHESTER: Thank you, Judge.

25 THE COURT: All right. I have five motions that were

1 noticed, and I will deal with those in the order in which  
2 they were filed. And then there are a couple of additional  
3 motions that are now ripe. Whether or not we have time to get  
4 to those, we will see when we deal with the ones that were  
5 scheduled.

6 So, starting with docket entry number 3529, motion to  
7 compel Abbott by the United States.

8 MS. BROOKER: Good afternoon, Your Honor. Again, I'm  
9 Rene Brooker. Just to remind the Court, I'm from the civil  
10 division of the Department of Justice in Washington, and Justin  
11 Draycott, who will argue two of the motions today, we're from  
12 the same office. And I do want to thank, Your Honor, for  
13 putting these all on the docket all at the same time. I think  
14 both Abbott counsel and government counsel and relator's  
15 counsel, we appreciate when you--

16 THE COURT: Sure.

17 MS. BROOKER: --accumulate them all so we come here  
18 and hit as many in one day, so we appreciate that.

19 I think I can briefly set forth for the Court what  
20 this motion is about and since I believe it was only last week  
21 when Abbott filed, or excuse me, not with respect to this one,  
22 let me just say, I just want to briefly lay out our position  
23 and I will briefly address what I know Abbott counsel will  
24 probably stand up and address and try to be most efficient.  
25 Your Honor may recall that the last time we were before the

1 Court, we argued the issue of the, amending the MDL  
2 protective order and particularly the big issue on Your Honor's  
3 plate was the sharing provision. Your Honor did amend the MDL  
4 protective order and allowed us to share documents that Abbott  
5 produces in this case with the states and Your Honor is  
6 probably aware, Judge Saris signed that. Abbott did not appeal  
7 Your Honor's decision, and what we are here on on today's  
8 motion is exactly the flip side of the Department of Justice  
9 sharing Abbott documents with the states and that is it's a  
10 pretty simple straight forward issue. We also would like by  
11 this motion for other government entities and relator, Ven-A-  
12 Care, who is the same relator in the Texas case, to be able to  
13 share the set of documents that Abbott has produced to again  
14 other government agencies and to relator, Ven-A-Care, in Texas  
15 with us. So it's really just kind of the flip side which the  
16 MDL protective order could not address head on so that's why we  
17 filed this separate motion. We do believe that allowing this  
18 is as simple as enforcing Judge Saris' earlier CMO's in this  
19 MDL proceeding on this very issue. I think we set forth in our  
20 brief CMO 5 and 10 and also CMO 9 address this very issue and  
21 in fact ordered the defendants over the course of years to  
22 produce to everyone as they joined the MDL proceeding  
23 everything they had previously produced to other entities and  
24 obviously the reasons for Judge Saris' opinion are apparent to  
25 streamline the discovery process, to minimize the amount of

1 motions practice that come before the court. We believe  
2 that those same considerations and concerns are here. You  
3 know, obviously there is no burden to Abbott, and I don't  
4 believe Abbott, counsel will speak for Abbott, but I don't  
5 believe there's any real burden objection that's not the  
6 objection by Abbott. In fact, all we're really asking Abbott  
7 to do at most is to burn some CD Roms and just produce to us  
8 what they've already given to several other jurisdictions,  
9 including again, Mr. Breen has this very set of documents, so  
10 we could even minimize the burden to Abbott by asking Mr. Breen  
11 just to give those CD Roms to us. It's as simple as that.

12           We have a couple of practical problems. I consider  
13 this a very practical motion because we have some practical  
14 problems that we had to date as a result of not having this  
15 provision or this order in place. We are working, obviously  
16 with relator, Ven-A-Care. We are obviously going to have some  
17 of the same experts that appear in the Texas case, that appear  
18 in our case. To date, it has been extremely costly and onerous  
19 for Mr. Breen himself to share documents with us and to discuss  
20 documents, even those that we got from Abbott in this case  
21 because he has to go through a very laborious process of trying  
22 to determine what documents Abbott gave him in Texas and are  
23 they on the list that Abbott gave us to be sure that we don't,  
24 you know, mix the documents and to be sure, frankly, he has not  
25 discussed with us any documents that he received in Texas that

1 Abbott hasn't yet produced us. Its cost some costly  
2 impractical problems for us.

3                 Here's Abbott's arguments which we respond to and I  
4 hope I capture them all. You know, first I think that Abbott  
5 would say this is a relevance issue. For Abbott I think that's  
6 what it comes down to. They believe that from their  
7 determination of the documents since some of the other  
8 jurisdictions have sued on different drugs, which is true, then  
9 what we've sued on in this case, Abbott would say, well, some  
10 of the documents on those CD Roms are not directly relevant to  
11 this case. And that may be true. There may be some documents  
12 that, you know, we may get more documents than we need to or  
13 care to review, but we've also learned in a separate motion  
14 that may or may not at this time yet be before Your Honor,  
15 relator, Ven-A-Care, has identified many documents in a subset  
16 of highly relevant documents that Abbott produced in Texas but  
17 has not produced to us. Whether that is intentional or  
18 inadvertent is sort of really beside the point. And some of  
19 those we're going to be start filing, you know, we're going to  
20 be filing motions to compel on, we're going to have to argue  
21 about those. All of this can be completely streamlined if we  
22 just get that set of documents.

23                 The other point that Abbott may raise here today is  
24 that recently Judge Saris, we held a hearing before Judge Saris  
25 on the CMO, and I believe that was back in late February, and

1 pursuant to that CMO conference, this issue of sharing came  
2 up because it was sort of a part of the CMO. It did not get  
3 addressed, however, and Judge Saris expressly said that she was  
4 going to leave this issue to the Court. She also asked in  
5 order to I think assist the Court with determining at least  
6 with respect to the subset of documents that relator has, not  
7 with respect to the entire subset of documents we're trying to  
8 get from all the jurisdictions, but at least with respect to  
9 Vena-A-Care subset of documents, she asked Ven-A-Care to set up  
10 a procedure which has happened and a motion has been filed.  
11 It's been fully briefed, where Ven-A-Care and Abbott have  
12 exchanged documents that were produced in Texas and not  
13 produced here, and determined that there was significant sample  
14 of documents that are highly relevant to us in this case that  
15 we did not get. That's a separate motion, and again I'm not  
16 sure, that may be one of these ancillary motions--

17 THE COURT: Uh-huh.

18 MS. BROOKER: --which we'll get to. The point being  
19 there is nothing that Judge Saris said at the hearing which you  
20 may hear from Abbott counsel that prevents the Court from  
21 entering this order. Judge Saris did recognize and it is true  
22 that under the Federal Rules of Civil Procedure that have been  
23 in effect for the last seven years, that parties are not  
24 entitled to go on wide fishing expeditions at great expense and  
25 burden to another party if the documents are not directly

1 relevant to claims or defenses. So one thing we would say  
2 in response to that is we embrace Rule 26 as it exists today.  
3 All of our briefing, we cite Rule 26, and we believe that all  
4 the documents we're seeking are relevant to claims or defenses  
5 in this case.

6                 Also, I would say, Your Honor, you know, so to the  
7 extent that Judge Saris' comments, you know, Abbott here,  
8 counsel will argue today bar us from getting that relief. I  
9 don't believe that's true. She was very adamant that she had  
10 not read these briefs. She was not prejudging this motion, and  
11 also she did expressly state at the hearing that she recognizes  
12 that even if documents do not relate directly to the subject  
13 drugs at issue in this case, they may very well be relevant to  
14 this case for 404(b) evidence as evidence of knowledge, intent  
15 or other crimes. We also would argue that they are, a lot of  
16 the documents that Ven-A-Care has set aside as material, we  
17 should be getting from Abbott's Texas production, also relate  
18 to 406 under the Federal Rules of Evidence habit, you know, we  
19 want all documents that have anything to do with AWP, with  
20 reimbursement and that shows the force of conduct that we see  
21 here today, even if they are not directly related to the four  
22 subject drugs.

23                 So, I believe I've addressed, and if not, I'm happy  
24 to address once Abbott counsel stands up, the reasons for this  
25 motion.

1 MR. BREEN: One point.

2 MS. BROOKER: I'm sorry, if I could just consult.

3 I don't know, Mr. Breen wants to make a point. Is  
4 that okay with Your Honor if he addresses you now? He has--

5 THE COURT: Sure.

6 MS. BROOKER: --joined in this motion.

7 THE COURT: Sure.

8 MS. BROOKER: Okay. But all of that being said, I  
9 just wanted to summarize that I do believe that this would  
10 streamline discovery in this case and greatly minimize the  
11 motions practice we have before this Court because in large  
12 measure, when we get that subset of materials, we will then  
13 really be able to focus and troubleshoot on areas of documents  
14 that are still remaining to be produced. But we do believe  
15 that probably what Texas received is significant in terms of  
16 materials that we are trying to get Abbott to produce to us  
17 right now, particularly because the Texas AG's office and  
18 Mr. Breen spent a year before the Texas Appellate Court, the  
19 Texas Supreme Court, litigating this issue, getting documents  
20 released off of Abbott's privilege log that relate to the exact  
21 same issues in this case. So basically we're trying to avoid  
22 this Court having to have the same battle all over again that  
23 the Texas court has already engaged in, and that's all I'll say  
24 at the moment, Your Honor. Thank you for hearing me.

25 THE COURT: All right. I'll hear you now.

1                   MR. BREEN: Thank you, Your Honor. Really  
2 briefly, I just wanted to kind of point out one thing and that  
3 is that I think this is a little simplified if we go back and  
4 look at CMOs 5 and 10 because, and that's really what this  
5 motion is based upon because there's really two universes of  
6 documents that we're talking about here. First off, we're only  
7 talking about documents that Abbott has already produced and  
8 one universe is documents produced to other government  
9 litigants or investigative agencies. The other universe is  
10 documents they produced in the MDL, primarily in the class  
11 cases. And CMO 5 and CMO 10, which postdates 9, are very clear  
12 that if Abbott or defendant turned over documents to a  
13 government, they're supposed to share them with other  
14 governments. CMO 9, which Abbott raises as being different,  
15 talks about documents that Abbott produced in the MDL and  
16 that's the one that says if, they don't have to give to a  
17 government documents from the MDL that may relate to drugs that  
18 aren't pled or things of that nature. We'd have to go back and  
19 litigate the motions on those, the 404(b) and 406 motions, but  
20 we're just talking about the documents that Abbott has given to  
21 Texas already, Pennsylvania, California, any of these  
22 government litigants, most of which Ven-A-Care and myself are,  
23 I mean, I'm an attorney of record in all those cases, and we've  
24 been litigating in advance in Texas. As Ms. Brooker said,  
25 we've been to the Supreme Court twice. We've won every writ of

1 mandamus Abbott's filed. They filed four of them out there,  
2 and we're slowly hitting this stuff now because we're taking  
3 joint depositions, but the problem is I can't show the  
4 government a lot of these documents that were actually in a  
5 joint deposition and that's when the documents are provided or  
6 until we get, until Abbott agrees to turn over a transcript and  
7 there are still a lot of outstanding transcript issues. All we  
8 want with this discrete motion is to enforce CMO 5 and 10, and  
9 let the United States and Ven-A-Care as government litigants in  
10 this MDL get exactly what those orders say, and that is  
11 anything Abbott has given to another government entity, be it  
12 in an investigation or in litigation and those CMO's cover  
13 both. That's all we're asking. The flip side of what Your  
14 Honor has already ruled, which is we can share with those same  
15 government parties, that's what your protective order says. We  
16 can share with those same government parties, and now, but it's  
17 got to work both ways or you can't have the cooperation that's  
18 intended by the Manual for Complex Litigation among common  
19 litigants and there's no more common litigant than Ven-A-Care  
20 who is in all these cases.

21 Thank you, Judge.

22 THE COURT: Mr. Daly, or your colleague?

23 MR. WINCHESTER: Actually, it's me, Judge, Jason  
24 Winchester.

25 With respect, Judge, our view is that this motion

1 completely dead in the water as a result primarily of the  
2 proceedings before Judge Saris on February 27<sup>th</sup>. Ms. Brooker is  
3 correct the parties did appear before Judge Saris on that day  
4 in conjunction with what was later entered as CMO 29 and the  
5 plaintiffs for their own purposes on that day sort of jumped  
6 the gun and raised this directly with Judge Saris. This motion  
7 asks you to direct that in this case where the government has  
8 charged only four drugs, that they should be allowed and Abbott  
9 should be forced to give them, every document that we've ever  
10 produced in any other case, including in the Texas litigation  
11 Mr. Breen referenced where there are 188 more MDCs at issue in  
12 that case that are in issue here. They raise that specific  
13 point to Judge Saris. We want everything from all the other  
14 cases. Please tell Abbott to give us everything from all the  
15 other cases, and I'm happy to give the Court a transcript of  
16 the February 27<sup>th</sup> proceedings, but Judge Saris says, and this is  
17 at page 9, "You are not entitled to documents on any single  
18 drug if you haven't charged it." She goes on to state at page  
19 15 that, "You cannot use this lawsuit as a fishing expedition  
20 for 10 more drugs that you are interested in but have not  
21 charged." There are additional statements to this effect at  
22 pages 16, 23, 24 and 25 of the transcript, and then on page 29  
23 she states what I think is really the depth of this motion  
24 before the Court, "I am not simply going to say you," the  
25 government, "across the board are entitled to every document

1 produced in every suit even if it involves drugs that have  
2 nothing to do with yours." There is nothing left of this  
3 motion. Judge Saris took this up directly and said you,  
4 government, are not entitled to all those documents that Abbott  
5 had to produce in other cases about other drugs that are not at  
6 issue here because they are at issue in those other cases.  
7 This case is four drugs, all from the hospital products  
8 division, vancomycin, sodium chloride, dextrose and sterile  
9 water. That's it. The government chose to bring that case and  
10 to bring it much more narrowly than the one that Mr. Breen is  
11 involved with in Texas or in other places where he is  
12 litigating.

13 To the extent, Your Honor, that there's anything left  
14 of this motion and there really isn't, we think that it's  
15 properly before Judge Saris because as counsel I think  
16 accurately stated, once Judge Saris made clear, okay, you're  
17 not entitled to everything, you've only charge four drugs here,  
18 Mr. Breen brought up this issue of well, Judge, even setting  
19 that aside, I still think there are some documents that we've  
20 got in the other cases from Abbott that DOJ should get here,  
21 and Judge Saris set up a platform for having that aired, which  
22 was codified in CMO 29. She said, bring me your 100 best most  
23 representative documents, show them to Abbott, the ones that  
24 they agree should be produced they'll produce. If you guys  
25 can't agree on certain other, then bring them to me, and that

1 motion was filed or that exercise was gone through. We did  
2 agree after a meet and confer with Mr. Breen that certain of  
3 the documents he provided to us as not being produced, first of  
4 all certain of them had been produced, and second, there were  
5 certain other ones we agreed should be produced to the  
6 government. We produced those. There are certain documents,  
7 we believe, should not be produced, and that is the subject of  
8 a separate motion which I believe is before Judge Saris,  
9 although I could be wrong on that, but she invited it to be  
10 filed before her. It has been filed and has been briefed.

11 THE COURT: Can you give me the docket number?

12 MR. WINCHESTER: I don't know that, Your Honor. I'm  
13 not sure if Mr. Breen knows. It was his motion.

14 MR. BREEN: I was trying to find it but all my copies  
15 don't have the docket number on it. I was just looking for  
16 that knowing that it might come up. I think we were asking  
17 before the hearing whether that was one of the ones that was  
18 set before Your Honor also.

19 MS. BROOKER: Your Honor, I can give you a docket  
20 number. I just need to go back to my bag--

21 THE COURT: Sure.

22 MS. BROOKER: --at the appropriate moment. Would you  
23 like me to do that right now?

24 THE COURT: When it's convenient.

25 MR. WINCHESTER: If I'm reading it correctly, Judge,

1 it may be document 4122.

2 THE COURT: All right.

3 MR. BREEN: Is that your response?

4 MR. WINCHESTER: No, I'm reading your motion here.

5 THE COURT: I think 4122 is a response.

6 MR. BREEN: It is, Your Honor. 4122 is my memo of  
7 law, so 4121 would have been the motion.

8 THE COURT: And that is in my group of ripe today but  
9 not noticed motions, so--

10 MS. BROOKER: Yes, and it is correct.

11 MR. WINCHESTER: So that's the other motion, Judge,  
12 which I don't think is actually up before the Court today but  
13 for this, this particular motion--

14 THE COURT: It's your feeling Judge Saris should deal  
15 with that motion?

16 MR. WINCHESTER: I think that's completely up to the  
17 Court.

18 THE COURT: All right. Okay.

19 MR. WINCHESTER: It was my understanding just based  
20 on her, the conversation initially was before her, she said  
21 bring your motion to me. She may well have discussed it off-  
22 line with Your Honor and decided to have Your Honor take that  
23 up, which is totally fine with us.

24 But I think based on those issues, this motion that's  
25 before the Court right now, which is the give us everything

1 motion because we want it, is dead. That the court has made  
2 very clear the government is not entitled to all those  
3 documents having only charged four. And I would also point out  
4 to Your Honor that that is a completely consistent position  
5 with CMO 9 which has been on the books for a very long time  
6 wherein the Court says a governmental entity plaintiff that is  
7 a party to the MDL proceeding, which is the government here,  
8 shall be entitled to documents, except that no such plaintiff  
9 shall be entitled to have access to A) documents produced by a  
10 defendant that is not a named defendant in the operative  
11 complaint filed by such plaintiff; B) which is the one that is  
12 at issue for us here, documents relating to drugs that are not  
13 identified in the operative complaint filed by such plaintiff,  
14 and C) documents produced by defendant that are not otherwise  
15 relevant to the claims asserted. So here, CMO 9 as applied in  
16 this instance is very consistent with what Judge Saris said  
17 back in February which is you get the documents for the drugs  
18 you've brought in your case that's consistent with the post  
19 2000 rules under Rule 26, which is you get the documents and  
20 the discovery for the case you brought. This is the  
21 government's case. We have agreed to give them all of the  
22 relevant documents concerning the four drugs they brought. We  
23 even agreed to go beyond that and to give them documents that  
24 would relate to those four drugs, even if they don't  
25 specifically mention them, and we've agreed to go even further

1 beyond that and to produce any documents that would arguably  
2 establish what counsel referred to as a pattern and practice  
3 regardless of drugs. So I think Abbott has agreed to give the  
4 government everything to which it is rationally and  
5 legitimately entitled in this case. The further request, which  
6 is give us documents that have nothing to do with our case, we  
7 submit has been denied by Judge Saris and should be denied by  
8 this Court.

9 MS. BROOKER: May I address, Your Honor?

10 THE COURT: Briefly.

11 MS. BROOKER: Yes, I will be brief. Your Honor, may  
12 I pass to your law clerk and to the Court so you have a copy of  
13 Judge Saris' whole transcript.

14 THE COURT: Certainly, that's helpful.

15 MS. BROOKER: Thank you. Your Honor, this was the  
16 issue that I was directing, oh, excuse me, addressing in my  
17 direct argument. I think that what the Court will find and I'll  
18 cite this so your law clerk can find these cites as well, the  
19 portions that were just read to you were incomplete snippets of  
20 what Judge Saris said at the hearing, and even some of them on  
21 the same exact page. What Judge Saris said, and I just want to  
22 point out a couple of her comments to give you the more  
23 complete picture, when this issue came up, first of all, she  
24 made it very clear that she had not read the briefs in this  
25 case and she repeatedly said at the hearing, you are all

1 talking about my prior CMOs and I don't recall at all what I  
2 said in any CMO. I don't have them committed to memory and I  
3 just don't recall. You may be right but I don't recall what my  
4 CMOs say, so I won't repeat what I said at the outset. The  
5 CMOs which are the basis of the government's motion allow this  
6 kind of sharing. CMO 9, which we directly address, which,  
7 along time ago, counsel has raised this today, but it's been  
8 addressed already, CMO 9 was only talking specifically about  
9 documents Abbott produced to the private plaintiffs. The CMO  
10 that preceded 9 and came after 9 made it very clear that the  
11 government gets all documents Abbott produced to all other  
12 government entities, including investigations and whatnot.  
13 Also, these are two separate motions before the Court. I do  
14 believe, and obviously I'm not going to speak for Judge Saris,  
15 she says in this transcript that she's going to decide when the  
16 motion comes in, whether she's going to decide it or send it to  
17 you and she said I'm probably going to send it to Judge Bowler,  
18 but I'm not going to speak for her. She never said definitely.  
19 I guess I'm not surprised that it ended up on your docket, but  
20 just to complete the snippets, on pages 9 and 15, when this  
21 issue came up and Abbott counsel said exactly what was just  
22 said now, four drugs, you get nothing more than the four drugs,  
23 she said, "You're not entitled to documents on any single drug  
24 if you have—"

25 THE COURT: What page are you on?

1 MS. BROOKER: I'm sorry, page 9 at the bottom,  
2 lines 18 to 23, where the Court says, "I generally believe the  
3 following," and again, she made it clear she was talking not  
4 based on anything she had recalled about the CMOs or read in  
5 the motion, "you're not entitled to documents on any single  
6 drug if you haven't charged it. You are entitled to do  
7 discovery beyond the four drugs to the extent it shows that  
8 there is some practice or pattern of conduct." Then you flip  
9 to another page that was just read, page 15, lines 6 through  
10 16. You know, Judge Saris was saying, "So one possibility  
11 would be an agreement that you're not going to sue for the  
12 other drugs and I'll order you to turn over all the CDs right  
13 now. You can't use discovery as a fishing expedition. That's  
14 the big bottom line. On the other hand, you can't barnstorm  
15 and just say it's just the four drugs. If in fact they show  
16 some overarching business principle and I, because they get to  
17 prove their case as to what management was thinking and doing,  
18 you know, prior bad acts kind of evidence," and, you know,  
19 Judge Saris went on also on pages 31 and 33 to talk, again,  
20 anything coming out of the sales and marketing team, talking  
21 about how you market stuff during the relevant time period,  
22 should be produced. But again, much more important than this  
23 is that Judge Saris said, we were citing her CMOs but she  
24 hadn't read them. She didn't remember what they said, and I'm  
25 telling the Court that they do say that the government gets to

1 have access to all of these documents. And one final point  
2 I would make about Judge Saris' comments, Judge Saris, since  
3 she hadn't read the brief, she was talking about in general  
4 Rule 26, and it is absolutely true that Rule 26 seven years ago  
5 said you can't overly burden a party with this huge fishing  
6 expedition for documents that don't relate to claims or  
7 defenses. No burden is implicated here, so Rule 26, contrary  
8 to what I've seen defendant argue in their brief, does not  
9 adjudicate substantive rights of a party and tell a party what  
10 it is they can or cannot do based upon documents that they  
11 received legitimately in discovery. We're not asking Abbott to  
12 even give us the CDs. We're just asking that we be allowed to  
13 share what's already been produced. If Abbott has some larger  
14 concern about charges that we later bring in a complaint, if  
15 that were to happen, they could deal with that issue at the  
16 time. Again, the issue is streamlining. I do believe that  
17 this brief is ripe for the Court to decide and particularly  
18 because I do want the Court to understand that if the only  
19 issue that's decided is Mr. Breen's motion, then we have to  
20 come back to the Court again and ask the Court, well, what  
21 about our larger motion, which asks for us to get documents  
22 that Pennsylvania shares with us and other states. And again,  
23 it doesn't make any sense that we can now share with states but  
24 states cannot share back with us, and I think it doesn't make  
25 sense because it's not consistent with what Judge Saris had in

1 mind in this MDL proceeding and I thank you for hearing me  
2 out.

3 THE COURT: Okay, just a minute.

4 MR. WINCHESTER: Very, very briefly, Judge. They can  
5 dance around it all they probably want. I'd invite the Court  
6 to read the transcript. Those were quotes I read to you.  
7 Judge Saris says fully knowing this case, you don't get  
8 documents about drugs you haven't sued on unless they go to  
9 pattern and practice. As I represent to the Court and counsel  
10 know as well, we have agreed to give them documents beyond just  
11 the four drugs, not just documents that mention the four drugs,  
12 any documents that deal with the four drugs even if not  
13 mentioned and any documents that would arguably relate to  
14 pattern and practice. Beyond that, Judge Saris could not be  
15 more clear, you do not get 100 other drugs when you've sued on  
16 four. That should end the issue.

17 THE COURT: All right. I'll take 2529 under  
18 advisement. Moving on to 3540, which is the motion for a  
19 protective order relating to the deposition of government  
20 counsel.

21 MR. DRAYCOTT: Thank you, Your Honor. Again, Justin  
22 Draycott on behalf of the United States. Just to refresh Your  
23 Honor's recollection, the notice of deposition states that  
24 pursuant to Rule 31(b)(1) of the Federal Rules of Civil  
25 Procedure, Abbott will take the deposition of, and I'm quoting,

1 "One or more employees of the Department of Health and Human  
2 Services who reviewed, approved or were consulted regarding the  
3 brief of the United States as amicus curia that was admitted by  
4 the Department of Justice on behalf of the Secretary of HHS in  
5 response to the Court's request that the secretary explain his  
6 views on the term average wholesale price as reflected in the  
7 Medicare Act and federal regulations." This is a deposition  
8 notice that calls for the deposition of government counsel. As  
9 you would expect the consultation between the Department of  
10 Justice and HHS was about a legal brief that addressed a legal  
11 question. It is unquestionably, goes to the deposition of  
12 government counsel. That in and of itself is highly  
13 disfavored.

14 Separate and apart from that is any communication  
15 that occurred is of course privileged. This would be core  
16 deliberative process and attorney-client communications  
17 regardless of whether or not the employees were, at HHS were  
18 attorneys or not, they'd still be privileged communications.  
19 So it is 1) a highly disfavored deposition notice for  
20 government attorney; 2) it goes to privileged communications,  
21 and also it goes to an issue that is now been rendered moot by  
22 the Court's order resolving the issue that was addressed by the  
23 amicus brief. The Court found that the term average wholesale  
24 price, which was the issue addressed by the amicus brief, will  
25 be construed pursuant to its plain meaning. So the issue has

1 also been decided. What's more, the issue is not decided or  
2 the issue does not turn on the personal beliefs or personal  
3 communications or the information that was provided in those  
4 communications between government counsel and agency counsel.  
5 This is decided it's a legal matter. It was briefed as a legal  
6 question. There is no fact, there are no factual  
7 representations in the government's brief, the citation to all  
8 authority is a legal authority. The case was brief in  
9 accordance with the principals articulated by the First Circuit  
10 in the *Lachman* case, which is that the, if the Court, first of  
11 all the Court didn't actually go to agency interpretations  
12 because it stopped at the plain meaning construction of the  
13 statute, but had it gone and looked at the agency, and had the  
14 issue come up of deference to the agency interpretation, the  
15 deference is to the formal expressions of agency interpretation  
16 and formal public pronouncements. This is clearly a protective  
17 order that should be issued, Your Honor.

18 THE COURT: Mr. Daly, why is it not moot?

19 MR. DALY: Why is it not moot? It's not moot because  
20 what Judge Saris asked the government to do or asked CMS to do  
21 is to file an amicus brief that set forth the position of the  
22 secretary of HHS and the administrator of CMS as to what their  
23 understanding of the term AWP means as used in the statutes and  
24 regulations. This was actually over my objection when it first  
25 came up because I said, Your Honor, they've sued us. They're

litigants. I object to litigants filing a friend of the court brief with Your Honor and the Court said, well, I'll take that under consideration and I am interested in what the agency has to say. After all, I'm talking about a regulation, first of all prior to 1997, and I'm talking about a statute from 1997 on, and counsel for the government indicated that CMS was the client of DOJ and the Court said, well, great. I want to hear what the government's position is. So they come in and they write a brief, which in the first line says that it is the, filed on behalf of the secretary of HHS and Mr. Draycott says in his argument today that it contains no factual assertions. I beg to differ, and I'm just going to read very briefly from our brief, page 9, Your Honor. On page 13 of the amicus brief, they state, "The final rule continued to reflect the secretary's intention to limit Part B drug payments to an amount related to supplier acquisition cost." They have a factual assertion of the secretary's intent. They have in the, on page 15 of the brief, they say, "The secretary understood that Redbook and other wholesale price tags updated their information monthly and thus for me, the secretary believed that they published wholesale prices were a source of acquisition costs of some physicians and therefore could be used to calculate Part B drug reimbursement." They say on page 13 and 14, "Rather, the published data was a resource to the secretary in setting the agency's national average wholesale

1 price for payment purposes." And there are other quotes of  
2 factual assertions that are in the amicus brief. Now, why do  
3 we want to know about that? We want to know about that because  
4 what the agency knew and understood about AWP is central to  
5 this case. They have sued us for hundreds of millions of  
6 dollars saying that we're entitled to the spread between the  
7 published AWP on the one hand and the actual acquisition cost  
8 on the other. They file a brief as a friend of the court  
9 saying out loud what the secretary of HHS and the administrator  
10 of CMS knew and believed and what those people knew and what  
11 those agency's knew is critical to the case. What Judge Saris  
12 has said over and over again, after her summary judgment  
13 ruling, and we cited this in the brief, but after her summary  
14 judgment ruling, she says, and this is in February 27<sup>th</sup>, the  
15 same hearing that was cited and I guess maybe you have it, page  
16 35 to 36, but it's cited in our brief as well, Your Honor, on  
17 page 12, the court says, "Everyone has a right to understand  
18 what the government was doing during the time period." And  
19 then court also recognized that, "What the Centers for Medicaid  
20 and Medicaid Services", I'm sorry, "Medicare and Medicaid  
21 Services, understood and knew and what they agreed to and what  
22 they didn't are things that the court was very interested in  
23 hearing." And this is when we were going to go out and start  
24 taking the depositions of current and former administrators of  
25 CMS. So the court has made it very clear, and now I'm coming

1 full circle to your mootness point, that the issues of what  
2 HCMS and its people and its administrators knew and understood  
3 and what they believe and what they thought AWP meant and  
4 whether they knew there was a spread or not is critical to the  
5 issues per Judge Saris. They go to causation, they go to  
6 scienter, they go to the statute of Limitations. This is a  
7 fraud case after all. They sued us for common law fraud. It  
8 goes to reliance. It goes to misrepresentation. It goes to  
9 falsity. It goes to all kinds of issues after the Court's  
10 decision on summary judgment. You can have a plain meaning and  
11 the Court has construed a plain meaning, but first of all, it's  
12 not a final order. Secondly, even if that remains Judge Saris'  
13 ruling, you can still have a plain meaning but in order to  
14 prove fraud, in order to prove that the government was misled,  
15 they have to prove that they were misled. They have to prove  
16 that they were deceived. They have to prove that they didn't  
17 know and that is, goes to the core of our defense.

18 So back to our little motion hearing. The key to the  
19 motion I think is in footnote 1 on page 5 of their brief, Your  
20 Honor, and there it says, this is after saying that the only  
21 people who fit the description of our request for a deposition  
22 person are lawyers. They drop a footnote and they say, to the  
23 extent that CMS attorneys in turn conferred with other agency  
24 personnel, those communications are plainly protected by the  
25 attorney-client privilege and attorney work product doctrine.

1 If you look at that carefully, it says, to the extent.  
2 They're not even willing to tell us that they actually  
3 conferred with anybody. They're leaving it - it's very crafty  
4 and to this day, and we've asked them over and over again, did  
5 you in fact talk to anybody or was this simply a lawyer driven  
6 litigation posturing brief that you filed in front of Judge  
7 Saris and they won't tell us, and they craft a footnote that  
8 says, well, to the extent we did, and we're not telling you, we  
9 won't tell you whether we did or not, that of course would be  
10 privileged. Well, you know what, it's not privileged if they  
11 went and talked to people inside of CMS or HHS or anywhere else  
12 in the government and got information about these factual  
13 assertions that I just read to you from the amicus brief, we're  
14 entitled to find out who those people are and what they knew.  
15 We told them the first time that they raised this issue of, oh,  
16 well, then you're just asking for a lawyer thing. This is an  
17 exhibit, one of the exhibits to our brief is a letter from my  
18 colleague, Mr. Torborge, who wrote I believe to Mr. Draycott  
19 and said, no, no, no. Let's be absolutely clear. I don't want  
20 a lawyer dep. If it's just lawyers, tell me that and then we  
21 know that it's just a litigation brief. But in response what  
22 they do is they craft this crafty little footnote where we do  
23 not know today whether or not they actually talked to anybody  
24 and it's critical to--

25 THE COURT: By the way, is the government willing to

1 put that in affidavit form who they conferred with?

2 MR. DRAYCOTT: We'll certainly consider. I did not  
3 prepare the amicus brief, Your Honor, so I will respond to  
4 that, but I think there's a couple of other points. I don't  
5 know if Mr. Daly was done.

6 THE COURT: Well, that was just my question. I don't  
7 think he's finished.

8 MR. DRAYCOTT: Okay.

9 THE COURT: That was just a question that I throw out  
10 to you.

11 MR. DALY: So I believe it is relevant, Judge. It is  
12 not moot. It goes to the agency interpretation. It goes to  
13 what the agency knew and understood during these years which is  
14 exactly what the quote I read from Judge Saris that she says  
15 she's interested in finding out. It goes to the merits of the  
16 case. It also goes to the weight that should be given to the  
17 supposed agency position that's reflected in the amicus brief.  
18 As the Court knows, courts look to what agencies say about the  
19 regulations that they handles and it matters to courts. It  
20 matters to Judge Saris. It matters to appellate courts. It  
21 matters to other courts who may look at this to say is this a  
22 litigation posturing brief or is it actually something where  
23 they went and talked to anybody and actually got their views of  
24 the agency. And we've cited a bunch of cases, I think on  
25 pages--

1                   THE COURT: Well, I'm just asking them whether or  
2 not they'd be willing to put in affidavit form who they  
3 consulted.

4                   MR. DRAYCOTT: Two things, Your Honor. One, we'll  
5 certainly consider that and consider that request. I would say  
6 that under *Lachman*, such consultations would be irrelevant  
7 because *Lachman* tells, is explicit. It couldn't be a more  
8 explicit case which says what the source of agency  
9 interpretation must be and the brief was prepared in accordance  
10 with the principles in *Lachman*.

11                  If I can quickly respond to, which is why there are  
12 no factual assertions here. If it turned to Mr., the defense  
13 brief at page 9 where there is a series of quotes from the  
14 government's brief. What is not included there is the citation  
15 for every statement that's made. For example, Mr. Daly read  
16 you the first one. The final rule reflected the secretary's  
17 continue belief as in 1991 of the wholesale price date, et  
18 cetera, et cetera. The citation for that in the brief is 56  
19 Federal Register at 59 524. For the next excerpt which is -  
20 actually I think you then jump down to number 15, the citation  
21 in the brief to the, the secretary understood the redbook and  
22 other wholesale price guides, et cetera, et cetera. The  
23 citation in the government's brief is 56 Federal Register 59  
24 524. With respect to the first, or the second excerpted quote  
25 from the government's brief, the citation there was 56 Federal

1 Register 25 792 and 2580, and I can fill in. In fact, I  
2 don't have to do it because what defendants have had since the  
3 brief was filed were citation to the Federal Register record  
4 for each of the statements contained in the government's brief.  
5 In other words, it was a brief that was prepared entirely in  
6 accordance with *Lachman*. That is, you don't go to personal  
7 opinions or agency officials. You go to formal statements in  
8 the public record which is the way that statutes and  
9 regulations are to be construed and the First Circuit couldn't  
10 have been more explicit on that in the *Lachman* case. So had we  
11 done what Mr. Daly suggest and that we go out and we start  
12 interviewing people as to their personnel views, that is not  
13 one of the cannons of regulatory construction that the First  
14 Circuit recognizes. That's why this is a legal brief and of  
15 why the consultation was with agency counsel. And I'll  
16 certainly say for the record, Your Honor, that our liaison with  
17 the agency is through the Office of General Counsel for the  
18 agency. I mean, that's very clear. When we want to talk to  
19 the agency, we do it through the Office of General Counsel, and  
20 I'm, that's the nature of this. But the most important point I  
21 think I have to make with Your Honor, is what relief that  
22 we're, is the nature of the relief that we're requesting here.  
23 What has been going on in this case, defendants have been  
24 taking discovery and doing depositions of government witnesses  
25 in terms of, and at this point, they've already taken the

1 depositions of three former HICFA administrators. We're not  
2 asking for a protective order that prohibits the line of  
3 questioning that Mr. Daly is talking about. In fact, in every  
4 deposition that I've been to, I haven't been to every  
5 deposition in this case, but at every deposition that I've  
6 attended, there has been full questioning about the witness'  
7 personal opinions. We've objected but the witness has  
8 consistently answered those questions. So we're not shutting  
9 down a whole avenue of discovery. All that discovery is  
10 ongoing, and as recently as yesterday when a former HICFA  
11 administrator was being deposed, he was questioned extensively  
12 about his personal views. This is a very narrow motion for  
13 protective order that goes to a very, very narrowly crafted,  
14 very specific deposition notice. We are just talking about the  
15 consultations with the client with regard to the preparation of  
16 a legal brief. That's the only protective order that is at  
17 issue by virtue of the government's motion. We have not asked,  
18 and we believe that everything that Mr. Daly just talked about  
19 is irrelevant. The personal opinions is clearly made relevant  
20 by the *Lachman* decision, was made irrelevant by the Lachman  
21 decision, but we're not asking this Court to shut that all down  
22 or say, you know, hence force you may not inquire of the HICFA  
23 administrator's personal opinion on any of these matters or any  
24 of his understandings. In fact, that discovery is ongoing and  
25 it's crossed all levels of the agency, they've been asking

1 these questions of OIG personnel, that is Office of  
2 Inspector General. They've been asking it of former  
3 administrators. They've been asking it of program people. All  
4 of that's ongoing. So there is no discovery that is being  
5 denied except discovery relating to consultations between DOJ  
6 attorneys and CNS, Office of General Counsel attorneys. That,  
7 the relief requested goes no broader than the deposition notice  
8 that we've moved on.

9 THE COURT: All right. I'll take it under  
10 advisement. The next being 3849, which is the motion to compel  
11 plaintiffs to provide an adequate response to interrogatories.

12 MR. DALY: Your Honor, in my view, I think there's  
13 been a lot of briefs filed on this particular motion that I  
14 think really is, tries to make a very simple point. I'm going  
15 to try to bring it into focus. As I stated, in the conference  
16 with the other motion, this is a fraud case. This is common  
17 law fraud. It's FCA. We've cited all the cases that indicate  
18 at pages 6 and 7 of the brief on this case, talk about how in  
19 an FCA case the government has to prove that it was misled.  
20 Actually, Judge, I am going to, if I may, just get some  
21 materials from the exhibit that I refer to. I can get you an  
22 extra copy if you need one.

23 MR. BREEN: Jim, just for the record, this is  
24 directed at Ven-A-Care also, right, not just the government?

25 MR. DALY: Yes.

1 MR. BREEN: I'll also be arguing that.

2 MR. DALY: So we cited in our brief the cases about  
3 misleading. I've also already made the argument and these  
4 arguments are related, Judge, between the one we just did, I  
5 think it's very clear that Judge Saris has put causation,  
6 reliance, also the Statute of Limitations, latches, estoppel  
7 are concepts that she herself has mentioned as perhaps being  
8 applicable here. They're all in play, and what they go to is  
9 what does the government have to say about what it knew and  
10 understood about AWP, and that's what this case is about.  
11 That's what it's been about from the beginning. That's what  
12 our defense is based on. That's what the claim is based on, so  
13 that's why we're conducting all these depositions on the  
14 subjects where those present and former administrators, Judge,  
15 are telling us over and over and over again that they  
16 understood AWP not to be some kind of actual average wholesale  
17 price. In fact, they knew every single one of them testified  
18 that it was not. I deposed Mr. Skully yesterday, the  
19 administrator who was in charge when the MMA was finally  
20 approved in 2003, and he says as far back as 1991 he knew that  
21 AWP was nothing but air. He says the entire system was sane  
22 and everybody, insane and everybody knew about it, everybody at  
23 CMS, everybody within the government that he talked to and  
24 everybody in the private sector. So the notion that anybody  
25 was running around thinking that AWP was actually the actual

1 average wholesale price is just poppy cock from the mouths  
2 of the heads of the agencies themselves as well as the people  
3 that work for them. So what happens? We have paragraph 42 of  
4 the complaint is what this goes to, and in paragraph 42, the  
5 government alleges AWP is used to refer to the price at which a  
6 pharmaceutical firm or a wholesaler sells a drug to a retail  
7 customer who then administers it to a patient. That's the  
8 allegation. It's the only allegation in the entire complaint  
9 that says what AWP was supposed to be. It's the only place in  
10 the complaint where they say that that's what AWP represents in  
11 the minds of the government. So we ask, and when we read this  
12 complaint, we said, okay, says who? And so we sent them an  
13 interrogatory that said essentially please tell us everybody  
14 that, you know, in the government, that believes this or says  
15 this or takes this position because we want to know. We're  
16 taking depositions and nobody said it yet, and we simply asked  
17 that that be done, and we want to know who believed it and who  
18 understood it and any evidence that Abbott ever made any  
19 representation that that's what AWP was in accordance with  
20 paragraph 42, and we think we're entitled to know that,  
21 entitled to know if anyone in the government or at CMS believed  
22 that, and in their initial response, and this is at Tab 3 of  
23 what I gave you, Judge, they filed an initial response to this,  
24 and on page 3 or tab 3, the last page, about halfway in, it's  
25 at about page 35 at the bottom, Judge, if you look up at the

1 second full paragraph, the government said, the general  
2 concept that the AWP refers to the price, the general concept  
3 that the AWP refers to the price at which a pharmaceutical firm  
4 or a wholesaler sells a drug to its customers is commonly  
5 understood in the industry. That's how they responded to the  
6 interrogatory, and we said, okay, who understood it that way?  
7 Who understood that commonly in the industry? Who in the  
8 industry thought that? Who in the government thought that  
9 that's the way the industry commonly understood it? Remember,  
10 we're getting all this testimony that says we didn't understand  
11 it that way. Far from it. We thought it was, the system was  
12 insane. Administrator Skully says, AWP, I've known for 10 or  
13 15 years that it's mostly air. So we asked them about that and  
14 they say that they're not going to provide any further  
15 information and they're not going to verify this. So when they  
16 filed this response, it had no verification and we said, well,  
17 you know, this is an interrogatory. If that's the position  
18 you're going to take, we want you to verify it so that we can  
19 depose the person who verified it because we want to know who  
20 on your side of the table is saying that this is the, how the  
21 term is commonly understood in the industry. They refused to  
22 verify it. So we filed a motion to compel asking for it to be  
23 verified and asking for a fuller answer. In other words, who  
24 held this position. So what they did was instead of responding  
25 to that, they filed a supplemental answer where this language

1 that I just read you has been deleted, but it's still out,  
2 it's deleted in the supplement.

3 THE COURT: And is the supplemental answer verified?

4 MR. DALY: It is verified. And the commonly  
5 understood language is deleted apparently or I think because  
6 they couldn't find anybody who could verify that sentence, but  
7 paragraph 42 of the complaint is still there. In other words,  
8 this allegation that we started with, which is that AWP is the  
9 actual average wholesale price of drugs and that's what it is  
10 understood to be, it's still there. It's still the focal point  
11 of their complaint against us and we're still trying to get  
12 information about who has that. And, you know, we want to know  
13 if there are people who hold that belief. That's going to go  
14 to the proof of whether or not they were misled about anything.  
15 And again, page 53 or paragraph 42 is the only--

16 THE COURT: But can you narrow it a little bit as to  
17 people in what positions? I mean, it's pretty general.

18 MR. DALY: Well, I mean we haven't asked for--

19 THE COURT: You're starting with the White House  
20 down? I mean--

21 MR. DALY: In our meet and confers with the  
22 government on this point, it's been, we've been offered to let  
23 it be somebody within CMS, somebody within HHS. I mean,  
24 obviously we don't want every agency of the government searched  
25 on this but the critical agencies, yes. Certainly, CMS,

1 certainly HHS and, you know, if there's somebody in the  
2 legislative branch that's been involved in health care issues  
3 that held this belief, we want to know. And we've been, you  
4 know, they haven't been willing to agree to that at least up to  
5 this point.

6                 And so that's kind of where we end up. We end up  
7 with, and I've given you this material in the attachments, but  
8 I not only have the depositions of folks, but I have included  
9 in the excerpts that I've given to you examples like Donna  
10 Shalala, the former head of HHS, who talks about in several  
11 excerpts that I gave you from her letters and reports where she  
12 talks about AWP is the thing that is reported in the compendia,  
13 and she comes right out and says it. It's not, it's not the  
14 actual average wholesale price, and I suppose it may be worth  
15 taking a quick look at that, Your Honor.

16                 Well, you start with Tab 5, Your Honor, of the  
17 materials that I gave you. This is actually Nancy-Ann Min  
18 DeParle, who is the former administrator of CMS before  
19 Mr. Skully took over, and at that bottom of the first page of  
20 her letter, which is at page A-2 of Exhibit 5 that I've given  
21 you, she writes, she is agreeing with something the OIG says,  
22 and she says, "If given that the authority HICFA would like to  
23 increase the discount we now take on the published average  
24 wholesale price and base our price on the acquisition cost."  
25 This is the head administrator of CMS telling us, telling the

1 world in this public document that we take our discount on  
2 the published average wholesale price, the one that's published  
3 in the compendia, not some paragraph like 42 of the complaint  
4 that we're looking at where they say that it's some reference  
5 to actual acquisition costs.

6           But my point in all this is to, just to bring it full  
7 circle is that paragraph of the complaint is out there. They  
8 have made this critical allegation. All we've asked for is to  
9 identify for us somebody on your side of the table, and we can  
10 limit that in a way that's appropriate, we offered to do that,  
11 certainly, it has to begin with anybody in CMS. I mean, I'd  
12 like--

13           THE COURT: Well, can we start with identifying one  
14 person in CMS?

15           MR. DALY: That would be a start. I'm not sure they  
16 can do it, but I'd like to see that.

17           MR. DRAYCOTT: Your Honor--

18           THE COURT: Why can't you do that?

19           MR. DRAYCOTT: Your Honor, this, the first thing I  
20 think we need to put this motion in context. What I think has  
21 become abundantly clear from everything I've just heard is the  
22 purpose of this is to reargue a legal point that's actually  
23 already been decided by Judge Saris in the November 2<sup>nd</sup> order.  
24 She's ruled on the meaning of AWP. But if we, I think the  
25 first thing is to step back. Their, this complaint is true to

1 form of most complaints. It has a series of background  
2 paragraphs including one on the jurisdiction of this court, and  
3 then in Section 6 it describes by way of background the  
4 operation of government health care programs. The allegations  
5 against Abbott actually begin on paragraph 51. In paragraph 42  
6 there is a legal statement which says what AWP is. It is  
7 exactly consistent with they way this, with the way Judge Saris  
8 ruled. It is a legal statement in the complaint providing a  
9 background statement and a citation in most of these sections  
10 of the brief, I'm sorry, of the complaint, are to the program  
11 regulations which control as to why the government asserts that  
12 AWP is not just any price that can be reported and can't  
13 certainly be a price that was constructed to act as a kickback  
14 to physicians or providers that were purchasing drugs, that's  
15 been laid out in the brief of the United States' amicus curiae.

16 The one issue that Abbott has to understand by now in  
17 this case is the government's position with respect to the  
18 meaning of AWP. What's more the issue has now been laid to  
19 rest by Judge Saris' order which expressly adopts a plain  
20 language construction. So it is, you know, now with respect to  
21 again, the, Mr. Daly has gone on a wide range in discourse of  
22 the fight that he wants to have with the government regarding  
23 the result reached by Judge Saris in her November 2<sup>nd</sup> order, but  
24 an interrogatory directed to sort of a preambled paragraph in  
25 the complaint is just not the way that the bait is going to

1 move forward. I mean, technically at some point could be I  
2 guess a motion for consideration of Judge Saris' November 2<sup>nd</sup>  
3 order, but with respect to who in the government knew what, the  
4 one thing that certainly defendants, one issue the defendants  
5 are taking discovery on right now, is this, these are issues  
6 that are being discussed with every government deponent that's  
7 being caught out there. It's been discussed with three former  
8 HICFA administrators. It's being discussed with every program  
9 person that's being deposed. With respect to the people in the  
10 Office of Inspector General who are not part of CMS but are  
11 doing studies analyzing reimbursement, it's being addressed  
12 with all of those witnesses. This is just not an area where,  
13 that's properly subject to a motion to compel with respect to  
14 the background and legal statement in a complaint. It's, I'm  
15 trying to put this in context. It's as if we had put, you  
16 know, when, if and when Abbott files an answer, it's as if we  
17 noticed every interrogatory with respect to every legal  
18 contention in their complaint or every legal contention in a  
19 brief they filed. Identify everybody at Abbott that believes  
20 that this case may be subject to the Statute of Limitations.  
21 It's just not going to, it's irrelevant because it's not going  
22 to drive the resolution of the legal issues that lie at the  
23 core of the issue they're looking at. The issue of what any  
24 individual thought or believed, ultimately is irrelevant and  
25 Lachman again makes that clear. They issue her is this is a

1 statute, it's a term that appears in statute and  
2 regulations, it's been resolved as a legal question. To the  
3 extent that they wish to take discovery on what individuals  
4 thought, again, we've noted our objections to that line of  
5 questioning, but we certainly haven't ever instructed a witness  
6 not to answer those questions. So they're fully developing a  
7 record. There is also an abundant record in the public record  
8 already in terms of the Federal Register of published OIG  
9 reports. There is, and certainly Abbott has made this point  
10 since the motion to dismiss which is, there is a voluminous  
11 public record about the agency interpretation of this term,  
12 what they knew. It doesn't get resolved by a motion to compel  
13 on a background statement--

14 THE COURT: Okay.

15 MR. DRAYCOTT: --in a complaint which states a legal  
16 definition which has been, which is absolutely consistent with  
17 the court's holding. What's more, we've cited to industry  
18 publications in the answer as to why, and just to make one  
19 thing very clear, we don't believe that verification is  
20 necessary on a straight legal term. Notwithstanding that, we  
21 agreed to verify before they filed their motion, and the  
22 question, why did they move to compel? That's the mystery.

23 THE COURT: Okay. I'm going to take it under  
24 advisement. I want to go back and look some of the things  
25 Judge Saris has said.

1                   MR. BREEN: Your Honor, can I make one point on  
2 this--

3                   THE COURT: Sure.

4                   MR. BREEN: --because he's shooting at me too on  
5 this, so, and it's--

6                   MR. DALY: I object to that, Your Honor.

7                   THE COURT: We don't like to talk about shooting in  
8 here.

9                   MR. BREEN: Poor choice of words, Judge. But anyway,  
10 number one, I just would reiterate and I'm not going to go over  
11 the argument, but AWP is the issue, and it's our right to find  
12 it's average wholesale price. Now, what happened as far as  
13 what was reported in those facts, that's really a separate  
14 issue, but they're asking us to put up a, give a factual  
15 interrogatory about what is in fact a legal term at this point.  
16 Well, that's one.

17                  But the main purpose for my jumping in here, this is,  
18 I think we can all agree, this is basically a contention  
19 interrogatory and we need to address this now early on in the  
20 case because this is a, my client is a qui tam relator under  
21 the False Claims Act and we filed a separate memorandum on  
22 this--

23                  THE COURT: Uh-huh.

24                  MR. BREEN: --and I can't speak for the government.  
25 I'm precluded by the statute--

1                   THE COURT: Right.

2                   MR. BREEN: -- from speaking for the government, and  
3 I think it would be a waste of time for me to have to make that  
4 objection every time they serve a contention interrogatory on  
5 Ven-A-Care. What Ven-A-Care thinks the government's position  
6 is on the definition of average wholesale or rather AWP is  
7 irrelevant, and even if I said something that was crazy, I  
8 couldn't bind the government because I can't prejudice the  
9 government's rights. So it's really overly burdensome and I'm  
10 using harassing not in a preserved term with the adversary, Mr.  
11 Daly, but it is harassing to have to keep filing motions and  
12 objections on that basis.

13                  So I would ask that the Ven-A-Care specific portion  
14 also be taken under advisement so that we don't keep getting  
15 these contention interrogatories. We're bound by law not to  
16 answer.

17                  MR. DALY: Your Honor, may I say two very quick  
18 things?

19                  THE COURT: Very quick.

20                  MR. DALY: Okay. One, counsel for the government I  
21 think mixing apples and oranges talking about *Lachman*. This  
22 motion isn't about statutory construction of AWP. It's about  
23 the allegation in paragraph 42 which says AWP is used in a  
24 certain way. It's a factual allegation that we're trying to  
25 get to. *Lachman* says in any event that you can in certain

1       circumstances be looking to the intent and how things were  
2       used in industry parlance in the appropriate circumstances. So  
3       even if it were a statutory construction argument, it would  
4       allow us to get into this. And finally, all we want is for  
5       them to identify somebody who can support this. It's not a  
6       moot issue. If it were moot, why would Judge Saris be talking  
7       about this on February 27<sup>th</sup>, the last time we were in front of  
8       her. I mean clearly, these issues are very much alive in the  
9       case.

10              Thank you, Your Honor.

11              THE COURT: All right. Moving on to docket entry  
12       4047, which is the government's second motion to compel.

13              MS. BROOKER: Thank you, Your Honor. Your Honor,  
14       this is a fairly straight forward request for production of  
15       documents in that the United States has outlined five specific  
16       targeted categories of documents that we believe Abbott has not  
17       yet produced and should produce in this case. These five  
18       categories are based directly on Abbott's defenses, testimony  
19       that we've gotten already in the fairly short amount of time  
20       that we've been taken deposition of, depositions of Abbott's  
21       witnesses. I will tell the Court that this is one in a long  
22       series of motions to compel that are coming with respect to  
23       Abbott. We've got a whole bunch more in the pipeline. After  
24       Abbott produced its initial disclosures back in august, it has  
25       bickered with us on just about every single category of

1 documents that we come across, again, either through witness  
2 testimony or their defenses. And again, we haven't really  
3 gotten their answer yet, which makes their withholding  
4 documents early on very problematic. We know that they're  
5 going to be filing an answer I think in the next six weeks  
6 because Judge Saris did just deny their motion to dismiss, but  
7 I will say, again, we set out and I have personally written  
8 more than a dozen letters outlining these categories of  
9 documents, trying to get Abbott to respond to the letters and  
10 we have not hid the ball at all. We tell them exactly why the  
11 categories are relevant. It's not a game we're engaged in. we  
12 have long discourse over why they're relevant, but they bicker  
13 with every single category. Some of it is downright silly.  
14 And let me just say, the second thing besides wanting those  
15 five categories of documents, we have not gotten a single  
16 privilege log from Abbott in this case and we know they're  
17 withholding documents on the basis of privilege. We know that.

18 THE COURT: Well, have they said it?

19 MS. BROOKER: Yes. I mean, we know it from the Texas  
20 case. We were just told very recently in our last phone call  
21 with them that we would get a privilege log, but it's really  
22 late in coming given that these are documents that should have  
23 been disclosed to us like eight months ago when they made their  
24 initial disclosures and long since past the deadline that Judge  
25 Saris set for a CMO. I mean, arguably, I guess--

1                   THE COURT: When are they going to get it, Mr.  
2 Daly? Mr. Winchester?

3                   MR. WINCHESTER: As we explained to counsel in our  
4 last phone call and also by letter last night, they will have a  
5 privilege log by this coming Monday. It's not part of the  
6 motion so I don't know why it's up, but they will have a  
7 privileged log by this coming Monday.

8                   MS. BROOKER: Yes, it is part of our motion, but I  
9 would ask is that going to include all documents to date for  
10 all categories of documents we've requested that they're  
11 withholding as privileged or is it some smaller subset of  
12 privileged materials?

13                  THE COURT: Can you enlighten us on that?

14                  MR. WINCHESTER: I'm happy to, Judge, although we  
15 just did have this out by way of conversation between us but  
16 I'm happy to tell the Court as well. As I told counsel, we are  
17 crafting a privilege log for this case, so it will  
18 be--

19                  THE COURT: In its entirety.

20                  MR. WINCHESTER: Yes, for this case. In other words,  
21 there are four drug cases--

22                  THE COURT: Four drugs.

23                  MR. WINCHESTER: --and the additional documents that  
24 I talked to you about, which are documents that don't  
25 necessarily talk directly about these drugs but would relate to

1 them and documents that would arguably suggest some pattern  
2 of practice relating to other drugs. We will do our best to  
3 make sure that the privilege log is current as of the time that  
4 we turn it over. We're working very hard to do that, obviously  
5 understanding that we have an obligation to seasonably  
6 supplement the log as other things come in. I think what  
7 counsel's question is is are we going to take their view of the  
8 universe, which is every document Abbott has about any of its  
9 products ever and do a privilege log on that? No, we're not.  
10 We are doing a privilege log for this case, which will cover  
11 the documents that are the body of documents at issue at this  
12 case and we will describe for them the documents that are being  
13 withheld on grounds of privilege.

14 THE COURT: All right. You are going to get it  
15 Monday.

16 MS. BROOKER: Yes.

17 THE COURT: You'll look at it then and we'll go from  
18 there.

19 MS. BROOKER: All right, Your Honor. At any rate, I  
20 will just briefly go over because I think I thoroughly laid  
21 this out in the motion, the five categories of documents and  
22 why they are relevant and briefly address Abbott's responses to  
23 them. Average manufacturer price data or AMP data that we  
24 refer to, it's all over Abbott's defenses. It's disgusted in  
25 their motion to dismiss. They go to each government witness

1 deposition and ask this question about isn't it a fact that  
2 you got our AMP data? They are representing in depositions and  
3 they are representing in their motion to dismiss, and I presume  
4 we're going to see it in their answer as well, that their AMP  
5 data was accurate and that the government could have relied  
6 upon it. Now, setting aside for the moment because I don't  
7 think we need to resolve this here, we believe that issue is  
8 irrelevant and it's a red herring, but nonetheless, it's  
9 ridiculous for them to say that this is an issue in this case  
10 and to be proceeding full speed ahead clearly intent to try and  
11 get this issue before a jury and to tell the government, but  
12 we're not going to give you our calculations on AMP. As a  
13 matter of fact, Abbott served us with requests for admission  
14 and asked us to admit that their AMP data was accurate, which  
15 is initially why we asked for their AMP data in addition to the  
16 fact that it's all over their briefs and all over their  
17 deposition question of witnesses. Now, granted they've  
18 withdrawn only the request for admission at the moment, they  
19 have non pending. They're obviously going to be reserving  
20 them. I don't know if that specific request will be in there  
21 but it's even beside the point. This is something that they  
22 are putting forth. They need to produce that AMP data to us.  
23 It's not sufficient for them to say you already have it. We  
24 gave it to you and we don't have to have our underlying price  
25 information or how we got that information or all of the

1 details which we do need for this case for their defenses at  
2 the very least. So that I put forth, Your Honor, as a  
3 ridiculous basis to bicker with us over providing that AMP  
4 data. Also, I would submit to the Court that we've asked only  
5 at this time for the AMP data for the subject drug. So that's  
6 not even an issue. It should not be a burden for them to  
7 produce that, and even if it is, there's going to be some  
8 burden to defend it in this case for producing material.

9                 The second category of documents--

10                THE COURT: Well, let's do one at a time.

11                MS. BROOKER: Okay.

12                MR. WINCHESTER: Thank you, Your Honor.

13                There's I think a quality distinction that counsel is  
14 glossing over here and I think misstating how we're using AMP.  
15 Average manufacturer's price or AMP is a creature of statute  
16 that Abbott and every other pharmaceutical company is required  
17 to report to the government. It is used by the government for  
18 purposes of relating to calculation of Medicaid rebates. So,  
19 just so the Court has that background, it should also be  
20 pointed out there is no claim in this case that relates in any  
21 way to AMP or to Medicaid rebates. The government has not  
22 brought those claims. It had every opportunity. It has not  
23 brought those claims. They're not in the case, so under the  
24 rules that have been in place since 2000, they are entitled to  
25 discovery about their case. This is not their case. The

1 contention always has been that well, you, Abbott, put AMP  
2 in play by, either through your request for admission or by  
3 pointing out the fact that the government gets AMP data. Both  
4 of those are not true. First of all as counsel states, there  
5 is no request for admission. That's just a red herring. There  
6 isn't one. As to the I think more pertinent issue, which is,  
7 has our defense somehow put this at issue, I think the answer  
8 is unquestionably no. Our defense and our use of AMP has  
9 nothing to do with how the AMP gets calculated. That's a  
10 statutory calculation. The use we make of AMP is simply to  
11 say, look government, when you come to this court and say I was  
12 defrauded in overpaying for drugs because I thought as we see  
13 in their complaint and we've heard hear at least from the  
14 lawyers and not from the actual people who ran the show, I  
15 thought AWP was the actual price people were paying in the  
16 marketplace. When they come to the Court and say that, I think  
17 it's relevant for us to show and we've said, wait a minute, you  
18 were getting the AMP submissions that showed you for these  
19 drugs and every other drug in every case that the average  
20 manufacturer price was substantially below this AWP that you  
21 were supposedly relying on as the street price of the drug. So  
22 it's what we liken to a hearsay statement that comes in to show  
23 effect on a listener. It doesn't matter how the statement was  
24 made, whether it's true or anything else. It matters for the  
25 effect on the listener. In this case, we haven't said, you,

1 government have an issue here because here's how we  
2 calculate AMP. We say, you have an issue in saying that you  
3 thought AWP was the real price when you're sitting there  
4 getting reported to you an average manufacturer's price that  
5 was much lower, regardless of how it's calculated. That's the  
6 only issue we made of it. So we have not put the calculation  
7 in issue. There's no claim in this case relating to  
8 calculation and for that reason we would oppose their motion.

9 MS. BROOKER: Your Honor, I would just briefly  
10 respond. Their AMP data, first of all their legal arguments on  
11 AMP data we completely disagree with. Again, I think that will  
12 be briefed at a later time. Their AMP data that they submit is  
13 their actual prices, that's at the very heart of this case, and  
14 again, as you will see, defendants bicker with every single,  
15 solitary cat, this is a very discrete specific category of  
16 documents.

17 THE COURT: To be produced.

18 MS. BROOKER: Thank you, Your Honor.

19 The next category of documents, again, very discrete  
20 and finite. The alternate site sales force, that particular  
21 group within Abbott, hospital products divisions, there's no  
22 doubt, there's no dispute I don't think at all between the  
23 parties that the focus of that particular group is relevant.  
24 We've been taking a lot of depositions in that area, and  
25 there's a finite set of individuals. We have been asking now

1 for probably six months that Abbott tell us how many  
2 individuals are in that group, in that sales force. We have  
3 not gotten a response. I had to depose somebody to find out  
4 the answer to that and learned recently a couple of weeks ago  
5 at a deposition of Cliff Krajewski, who is in that particular  
6 group for a number of years, that at any given point in time,  
7 at least from 1990 to '96, and it suggests that this is  
8 probably true for all the time period that we're talking about,  
9 that there were no more than 30 field sales persons in here.  
10 So we're talking about a small finite group of people, and from  
11 among those materials at this time, all we're talking about are  
12 specifically their written goals and evaluations that they  
13 received in terms of how they received, you know, their  
14 end-of-the-year evaluation, how they were compensated and so  
15 forth.

16 THE COURT: How many people are we talking about?

17 MS. BROOKER: We're talking about, again, 30 sales  
18 persons a year for over the course of at least, you know, a 10-  
19 year time period for starters. And it depends on what we see  
20 in those documents whether we have to trouble shoot and, you  
21 know, and ask for something broader than that. Very finite. I  
22 also deposed two people, Cliff Krajewski and another person,  
23 again both of these occurred two days in a row, a couple of  
24 weeks ago. Their testimony was very clear. Even though  
25 neither one of those are the sales people, they testified that

1 each of them in different parts of Abbott have written very,  
2 very specific written goals that they must meet each year and  
3 then they have an evaluation that is in writing. Both of them  
4 have those. Of course people save their written evaluations.  
5 One man testified that all the years he's been at Abbott, I  
6 think it was 25 years, he has his whole stack sitting on his  
7 desk. So not necessarily, you know, bringing this to Your  
8 Honor's attention to talk about those two individuals' files,  
9 but the point is, clearly the documents exist. Clearly they're  
10 probably not that hard to obtain, and again, we've been very  
11 specific with Abbott. They're relevant to show what marketing  
12 incentives the sales persons were offered to receive their  
13 compensation and their evaluation. Whether spread marketing  
14 was encouraged or rewarded, whether there were any changes  
15 during the relevant time period to the policy or practice in  
16 Abbott's marketing its drugs, what their recognition was, and  
17 it does matter and particularly Daryl Dorsey, granted he is a  
18 lobbyist, but he testified his goals would be very specific,  
19 that he would maintain, for example that he would see to it  
20 that a particular law went into effect or didn't go into effect  
21 and at the end of the year his performance would be measured  
22 against that very specific goal. Presumably, the sales persons  
23 are going to have no more or less specific goals than the other  
24 witnesses that we've deposed.

25 Now, the only real objection Abbott has to this, it

1 can't really realistically be burdensomeness. First of all,  
2 they never really undertook other than the deposition that I  
3 took to find out what the burdensome nature of it was, they say  
4 the documents are confidential personnel records, but I direct  
5 the Court to the MDL protective order and the one that this  
6 Court entered in this case, and the protective order expressly  
7 anticipates that this type of information might be produced,  
8 and it specifically allows for "past or current company  
9 personnel or employee information." Abbott produces almost  
10 everything in this case as highly confidential or confidential.  
11 So confidentiality, you know, is just not an issue in this  
12 case. And again, for Abbott to say that this is irrelevant is,  
13 I would say another category that's ridiculous. The only last  
14 thing I will say is that what Abbott did offer to produce,  
15 which we still haven't even gotten, are the policies. They  
16 think that's sufficient that we get whatever their policy was.  
17 Of course we want to see what the policy was, but it doesn't  
18 matter until we see how it was implemented with respect to any  
19 one particular employee and the policy is going to presumably  
20 say something broad such as employees will have goals and they  
21 will be evaluated according to those goals. It's not going to  
22 tell us whether they met those goals and whether they had to do  
23 with marketing incentives and marketing the spread and so  
24 forth. So I can see no reason at all that these materials do  
25 not get searched for and produced in this case.

1           Thank you.

2           THE COURT: To be produced.

3           MR. WINCHESTER: Your Honor, could I inquire just  
4 briefly about that. Is it the Court's ruling that the  
5 personnel files be produced in their entirety or simply that we  
6 review them and produce any material that would be responsive?

7           THE COURT: No, I think what is responsive to the  
8 interrogatory because people have all other kinds of  
9 information that's totally irrelevant.

10          MS. BROOKER: Yeah, I mean, there may be, we don't  
11 want irrelevant stuff, Your Honor, and we're happy to, it's a  
12 document request, not an interrogatory, but we're happy to  
13 specify that.

14          THE COURT: You don't need copies of peoples' degrees  
15 and--

16          MS. BROOKER: Exactly.

17          THE COURT: --things like that.

18          MR. WINCHESTER: But to the extent if we review a  
19 personnel file and there's absolutely nothing in there from  
20 which you could possibly argue that somebody was talking about  
21 marketing based on spread or compensated based on marketing,  
22 based on spread, it wouldn't be the Court's view they'd be  
23 entitled to that file, would it?

24          MS. BROOKER: I'd like to respond to that and  
25 Mr. Breen is saying he would like to respond. Your Honor, I

1 would say we will be the judge of that. It's a finite set  
2 of materials. How they were evaluated may be inculpatory or  
3 exculpatory, but it is important to see whether there are  
4 specific goals involved, reimbursement, AWP. We don't want to  
5 leave this. This is Abbott's position throughout which is  
6 making discovery like pulling teeth.

7 THE COURT: I've ruled, that which is not relevant  
8 should not be produced and if there is no information in the  
9 file relating to the request, the file is not produced.

10 MR. WINCHESTER: Thank you, Judge.

11 THE COURT: The time is getting short, so--

12 MS. BROOKER: Yes, Your Honor, the next category of  
13 documents, again, finite discrete set of documents, and  
14 specifically they are, there was a Tap settlement in this case.  
15 Tap was a joint venture between Abbott and another entity. We  
16 are not asking that the Court require Abbott to produce  
17 everything they produced in the Tap case or everything relevant  
18 to the TAP case.

19 THE COURT: the Tap case in this Court?

20 MS. BROOKER: Yes, Your Honor. Very specific, at the  
21 time that the Tap settlement took place, Abbott, around that  
22 same exact time changed dramatically its prices which is in  
23 large part the reason for the cutoff of the year 2001 for this  
24 lawsuit. When we say okay your damages is stop, we believe  
25 that the Tap settlement, which again it related to a different

1 drug, it was Lupron, but it was the same exact conduct, we  
2 believe that there were high level discussions within Abbott  
3 which caused them to start reporting accurate prices, which is  
4 the very crux of this case. So what we asked for, and I guess  
5 there's generally two categories, but the first category, which  
6 is specifically laid out, what we call Tap impact documents,  
7 and all we mean by that are any, I don't want to mis-cite what  
8 we wrote, but it was basically very specific, any documents  
9 that relate to discussions within Abbott not limited to  
10 hospital products division but among high level corporate  
11 individuals anything from their Medicare working group or  
12 wherever the documents come from that discuss how they reacted  
13 basically to the Tap settlement because we do believe it may  
14 have impacted the price reporting changes that they made in  
15 this case which again is the crux of this--

16 THE COURT: How are they reactive? I mean, be a  
17 little more specific than that, I'm afraid.

18 MS. BROOKER: Yeah, I mean, Mr. Breen said he can  
19 help with that if he's allowed, if he's permitted to respond to  
20 that, but here's what, here's how we've drafted it, all  
21 documents relating to or otherwise regarding the impact of the  
22 2001 Tap pharmaceuticals criminal plea and civil settlement on  
23 the prices or practices, excuse me, or pricing practices for  
24 Abbott's pharmaceuticals. So, you know, it's broad. Abbott  
25 has to interpret just like any document request. We don't know

1 what they have internally so we can't be more specific than  
2 that. But again, it goes, we're not asking for everything that  
3 was produced in Tap to be produced here. We're asking for that  
4 finite set. And the second set of Tap documents that I will  
5 mention relating back to the earlier argument that we had on  
6 the first motion before the Court, there are documents produced  
7 by Abbott and produced by Tap that other states have received  
8 from Abbott or from another entity in the Tap litigation that  
9 have very highly relevant witnesses in this case working for  
10 Abbott, have their name on those documents. One witness, Ms.  
11 Tobiason, who was just deposed for a second time yesterday, and  
12 she was shown Tap documents which show that Tap was consulting  
13 with hospital product division personnel on reimbursement and  
14 spread and average wholesale prices very relevant to this case.  
15 So there's also another set of documents. We're not asking  
16 Abbott to go back and search for that set. We're just asking  
17 that they be again allowed to be shared, some of which are  
18 being shared because they're used at depositions. But  
19 obviously at a deposition, you can't ask a witness about, you  
20 know, 100 documents, because there's just no time. We want all  
21 the documents that they produced related to these issues that  
22 impact our case to be shared with us. Again, there's no burden  
23 to Abbott, and I don't know if Mr. Breen--

24 MR. BREEN: Just a quick point here, Judge, and it  
25 shows, I know a lot about Tap from the other litigation, and we

1 know, and we've got a little bit of corroboration already  
2 that we could get even with the documents we got from Abbott in  
3 this case, that they restructured their entire way of doing  
4 business on the heels of the Tap and Ross settlements. They  
5 paid well over a billion dollars already for the same kind of  
6 conduct and to a great degree we're talking about here, but  
7 also for example Abbott's former president, Thomas Hodgson,  
8 went over to run Tap. He gave me highly relevant deposition in  
9 the Tap case. We had to move to compel to get it in the Texas  
10 case. It talks about the spread and knowledge - (inaudible -  
11 #3:29:58) - about it.

12                 In this case, Abbott, I too the 30(b)(6) document  
13 witness, Ellen Klauss, she says they hadn't even searched  
14 Abbott's corporate hierarchy for documents responsive to the  
15 government's request in this case ever. She testified to that.  
16 Now, Thomas Hodgson, I got his deposition in the Texas case. I  
17 can't turn, I can't show it to Ms. Brooker because it's  
18 declared confidential in the Texas case. It wasn't taken in  
19 the Texas case. We got it through a motion to compel in the  
20 Texas case. We've already been over that ground. So the Tap  
21 and Ross reactions, Miles White, their CEO, got a letter from  
22 Pete Stark, the ranking member--

23                 THE COURT: We know who he is.

24                 MR. BREEN: Well, weighs and means, okay, there was  
25 all kinds of reactions going on about that time where Abbott

1 changed their policy and they had to change it from  
2 something and we all, you know, subsequent other measures may  
3 not be admissible at trial but they're certainly discoverable  
4 so that we can get a feel for and work back from what they did  
5 to establish the truth and the facts in this case. That's all  
6 we're trying to do.

7 Thank you.

8 THE COURT: Mr. Winchester.

9 MR. WINCHESTER: Briefly, Your Honor. Obviously  
10 let's bring this back to what this case is and what it isn't.  
11 Tap is not a defendant in this case. Lupron is not a drug at  
12 issue in this case. The 2001 settlement that they want to talk  
13 about is a criminal plea for Tap where it pled guilty, Tap, not  
14 Abbott pled guilty to one single count having to do with--

15 THE COURT: I remember this well.

16 MR. WINCHESTER: Okay. So this is the three samples  
17 that were then billed for, not AWP. Okay? So this case is not  
18 about Tap, it's not about Lupron. I think Your Honor hit the  
19 nail on the head. There isn't anything even vaguely focused or  
20 pointed about this request nor relevant to this case.

21 Mr. Breen talks about Texas, and I think that actually is  
22 relevant because what they did in Texas was request this very  
23 same information from Judge Jenkins. We objected and he  
24 sustained that objection. They did not get a 30(b)(6) witness  
25 to talk about--

1                   THE COURT: This is what happens when you get to  
2 4:00. Everybody--

3                   MR. BREEN: That's right. I'm sorry.

4                   MR. WINCHESTER: --but we attached those papers to  
5 our response. Your Honor can see that. They asked to have  
6 Abbott designate a 30(b)(6) witness to talk about this, what  
7 impact did the Tap settlement have on Abbott, whatever that  
8 means, and the judge said, no, you don't get that. It's not at  
9 issue in the case. It's no more at issue here than it is  
10 there.

11                  In terms of I guess counsel's statements which is  
12 well, Abbott may have changed the way it did business as a  
13 result of seeing what happened in Tap, to the extent they're  
14 trying to discovery things about this reduction of price in  
15 2001, which by the way is where their complaint ends, then  
16 we've already told them we're giving them all the non-privilege  
17 documents that have to do with the reduction of prices for  
18 these drugs that happen in 2001. They're getting those  
19 documents. This class of things--

20                  THE COURT: All right.

21                  MR. WINCHESTER: --class of things they're talking  
22 about is outside the case.

23                  THE COURT: Denied without prejudice at this time,  
24 maybe to be renewed upon at further showing down the road.  
25 Right now I don't see the relevance.

1                   MS. BROOKER: Okay. Thank you, Your Honor. I  
2 appreciate that.

3                   THE COURT: How much more do we have?

4                   MS. BROOKER: Two more categories of documents and  
5 then a motion to compel 20 interrogatories, which I hopefully  
6 can summarize for you, interrogatory responses.

7                   Okay. The next category of documents are all  
8 documents relating to the drug vancomycin, one of the four  
9 subject drugs in this case. We have gone around and around  
10 with Abbott on this issue. Frankly, Your Honor, we never feel  
11 as though we have any firm representation from them that we  
12 have received all the vancomycin documents. The drug was first  
13 marketed I believe around 1988, so we've asked for the  
14 documents to be produced relative to vancomycin back to 1988.  
15 It's not too far prior to 1991. Obviously, you know, launch  
16 documents and other types of documents would be relevant. I  
17 know that Abbott has represented most recently in its  
18 opposition to this specific request what they've already  
19 searched for and produced to us and that they searched for them  
20 back in 1996 pursuant to the government's first civil  
21 investigative demand, and if I understand, maybe I don't, but  
22 if I understand correctly their position is that they're not  
23 going back and searching again. And I will say that their  
24 corporate designee on this issue, Ellen Klauss, who just  
25 testified in this case maybe four weeks ago, maybe a little bit

1 longer, my understanding of her testimony on this issues is  
2 that at that time they did not search back as far as 1988.  
3 Now, I know Abbott's counsel is going to stand up here and say,  
4 for the group of documents we produced in other cases that we,  
5 that relate to vancomycin back to 1998, we'll give you those,  
6 and maybe they're going to represent they already have because  
7 we just got a small number of documents in the last week or  
8 two, but that's not a representation that they had searched for  
9 and produced all those documents. The other bit of testimony I  
10 believe from Ms. Klauss is that they never searched for  
11 documents relevant to that drug outside of the hospital  
12 products division, and for Abbott to stand up here and say that  
13 only documents in the hospital product division are relevant,  
14 that's not true either. We have seen in other cases where  
15 Abbott's produced documents that, a lot of relevant documents  
16 from corporate offices and not just that one single operating  
17 division are relevant, so we want a representation that Abbott  
18 either has or is going to produce to us and search again for  
19 all documents relevant to the drug vancomycin, particularly  
20 because it is one of the four subject drugs.

21 Thank you.

22 MR. WINCHESTER: Judge, we're not sure why this  
23 motion got filed for vancomycin. They talk about back and  
24 forth, but I've been clear in every letter, every conversation,  
25 clear in our brief. They've asked for documents on the

1 marketing, pricing and sale of vancomycin. That is one of  
2 the subject drugs. We've agreed to give them those documents.  
3 That's not at issue. Why they moved, I have no idea other than  
4 to reach this point of pre '91 documents. For the pre '91 let  
5 me state very briefly, if they serve a CIB on Abbott back in  
6 1996 that requested documents dating back to 1986, Abbott  
7 responded. They have or if they don't have them already we've  
8 agreed to give them, any document pre '91 on vancomycin that's  
9 been produced in any other case. They're going to get those.  
10 They have documents pre '91. I've been in depositions where  
11 they've used documents pre '91. The question is should we in  
12 this case now have to go back and research again, and it isn't  
13 as simple as just saying, oh, grab that box of pre '91 stuff.  
14 It's literally going back and looking in every place we ever  
15 looked before. There's no reason to do it here. Judge Saris  
16 has set in the MDL discovery starting in '91 as far as we're  
17 aware of all these 25 or so AWP related cases nobody has forced  
18 discovery prior to 1991, that's years before the act on which  
19 they're complaint is based was even enacted. It's before the  
20 time that they've alleged specifically in their complaint as  
21 when the misconduct they've charge occurred. There is no  
22 reason to force Abbott to go back through this. It's not an  
23 easy undertaking. The burden clearly outweighs the benefit of  
24 getting these ancient documents, whatever additional ones there  
25 might be that they don't already have, let me make that clear.

1 MS. BROOKER: Your Honor, again, we--

2 THE COURT: I'm inclined to agree with Abbott on this  
3 one.

4 MS. BROOKER: Your Honor, we have - I'm sorry. Do  
5 you want to say something, Jim, you should stand up, but we  
6 have concerns about the testimony of their corporate designee.  
7 We don't believe that the representations that were just made  
8 are consistent with her testimony. We do not believe that  
9 there were ever thorough searches done, and I will tell the  
10 Court that since we have been involved with Abbott in this  
11 discovery, according to the corporate designee and frankly  
12 according to the representations of counsel, Abbott has done  
13 very little, if any, additional searches. They are producing,  
14 everything that we've gotten is pretty much by and large what  
15 they said we should expect to get other than a few trickling  
16 little documents, but we have new document requests. We are  
17 not bound by whatever we put in a CID at an investigative stage  
18 in 1996. Abbott is not spending very much time at all  
19 searching for documents. They say, look, whatever we gave  
20 everyone else cherry picked, we're giving to you and hardly  
21 any, and new searches were being done and that was confirmed by  
22 Ms. Klauss. We have sued Abbott on these drugs. They are very  
23 relevant. They can't run from the fact that it's a subject  
24 drug. They have not stated any burden. You can't just vaguely  
25 state burden without more than that. They should be in a

1 position to go back and search for documents, no different  
2 than the government is having to search ancient files to  
3 produce documents to Abbott even though we believe most of what  
4 they're asking for is irrelevant. You don't, you know, I have  
5 to represent, Your Honor, you don't see Abbott here with a  
6 bunch of motions against the government because we have been  
7 running circles around ourselves trying to give them everything  
8 that they ask for no matter how irrelevant it is, while on our  
9 end they bicker with ever set of categories that we set forth  
10 even though they're specific. So I would say Abbott is  
11 obligated in this litigation to go back and search for  
12 vancomycin documents.

13 THE COURT: Denied at this time.

14 Now, as to the next motion--

15 MS. BROOKER: There's one last category--

16 THE COURT: Is there one more?

17 MS. BROOKER: Yes, alternate site customers, Abbott  
18 has agreed, and I'm trying to shortcut this for Your Honor,  
19 Abbott has agreed to produce documents with regard to its  
20 largest customers, which is 80 percent of its customers, we  
21 accept that representation they've made to us. The 20 percent,  
22 there are, granted thousands of customers, so we, without  
23 knowing more Abbott has stated that that would be burdensome.  
24 But again, Abbott is not giving us any detail about the burden.  
25 We have always just like with respect to vancomycin and other

1 categories, made ourselves open to discussing and weighing  
2 the burden, but for them to come forward and say we're not  
3 doing any searches at all for specific categories because it's  
4 burdensome without more, we need more than that. If they're  
5 going to tell us, well, we can search current files or we can  
6 search, you know, this subset, we may be able to go back and  
7 forth with them, but they just basically said no. You're not  
8 getting documents on the 20 percent of customers, and, you  
9 know, we believe that those documents are relevant. Now, the  
10 one thing that I will say that we will accept here today, if  
11 Abbott wants to stipulate, which I doubt seriously it's  
12 prepared to do, that it is not going to be producing testimony  
13 or evidence or seeking to do that at trial of any of those  
14 customers that relate to the 20 percent that they say they're  
15 not producing and that are not burdensome, and if they're  
16 willing to stipulate that we're not going to hear from any of  
17 those customers at trial, then we're willing to consider  
18 withdrawing our document request, but as far--

19 THE COURT: All right. Denied without prejudice at  
20 this time. They're given 14 days to make a decision.

21 MS. BROOKER: I'm sorry, Abbott is given 14 days to  
22 make a decision about that stipulation?

23 THE COURT: Exactly.

24 MS. BROOKER: Okay.

25 MR. BREEN: Can I just add one point to that, Your

1 Honor? The key thing in that stipulation too is not only  
2 hearing from those customers but they're not going to put their  
3 customer's prices into evidence. That's critical because I  
4 don't want to hear about some customer paid some high price  
5 that I didn't know about before trial.

6 THE COURT: All right. I'm not going to get to 4060,  
7 docket entry 4060 simply because it's after 4:00, and I have  
8 some commitments upstairs. That leaves at least four motions  
9 for the next hearing. What I suggest you do after we adjourn  
10 here today is to confer with Mr. Duffy and see if you can pick  
11 a mutually convenient date.

12 MS. BROOKER: Thank you for that, Your Honor.

13 THE COURT: I will take under advisement 3529, 3540,  
14 3849 and on 4047, the ruling will reflect as ruled in open  
15 court.

16 MR. DALY: Your Honor, may I raise one important  
17 issue as a result of one of your rulings? On the AMP issue,  
18 Judge, AMP is a very confidential thing. It's not shared among  
19 companies. It's not shared, states don't have that  
20 information. Even when we give it to Medicaid or to CMS,  
21 Medicaid doesn't share it with Medicare, the two divisions.  
22 The problem I want to raise is that if we give it to them  
23 pursuant to your order, remember you've ordered that the  
24 government can then share that with everybody. So boom, all of  
25 our confidential AMP information goes out from the government

1 to everybody. Meanwhile, Mr. Breen is in the Texas case,  
2 he'll have the information. He's got a protective order in  
3 that case that allows him to share it with anybody who comes in  
4 and signs an undertaking, so the issue quickly is, we've got  
5 real confidentiality concerns and I guess I would ask the court  
6 to at least maybe subject to additional paper, although I hate  
7 to bring the court, that we don't allow your order to say that  
8 they can transmit it to everybody else.

9 THE COURT: All right. Can you work out a  
10 stipulation as to these particular documents?

11 MS. BROOKER: Well, they should be allowed to be  
12 provided to any states if what we're talking about is other  
13 defendants, that's another matter, and I do believe that that  
14 is something that is really something that Abbott counsel  
15 should be working out with the other defendants.

16 MR. DALY: Judge, none of the other states have sued  
17 us, and for the Medicaid rebates are not in the cases except in  
18 the couple where they have suits. This allows them a wholesale  
19 sharing of any state they want.

20 THE COURT: I'll give you 14 days to try to work out  
21 a stipulation.

22 MR. DALY: Thank you, Your Honor.

23 THE COURT: And if you can't, come back and-

24 MS. BROOKER: Thank you, Your Honor.

25 THE COURT: All right. All right. We stand in

1 recess.

2 MR. DALY: Thanks for your time, Your Honor.

3 MS. BROOKER: Have a good day, Your Honor.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

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May 21, 2007

Maryann V. Young